



Office of the Ohio Consumers' Counsel

**Before
The Ohio Senate
Energy and Public Utilities Committee**

Opponent Testimony on Senate Bill 102

**By
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**On Behalf of the
Office of the Ohio Consumers' Counsel**

June 20, 2022

Hello Chair Reineke, Vice-Chair McColley, Ranking Member Smith, and Committee members. I hope you and your colleagues are well.

Consumers' Counsel Weston and I thank you and the bill sponsor (Senator Wilkin) for this opportunity to present opponent testimony on Senate Bill 102. I will address some (but not all of) OCC's concerns with the bill.

The bill has some benefits for consumers. One benefit is constraining the PUCO from sitting on a party's application for rehearing. (Lines 62-69) The PUCO's delay of rulings on rehearing can interfere with a party's right to appeal to the Ohio Supreme Court. For example, OCC was prevented from appealing an AES electric security plan for more than a year due to such PUCO delay. Another benefit is barring utilities from using cash to induce parties to sign settlements in cases, for gaining PUCO approval of a settlement. (Lines 123-130) A further benefit is clarifying that the PUCO staff is subject to discovery from parties in cases where it is acting as a party. (Line 1129) A 1983 reform law (R.C. 4903.082) contains no exception for the PUCO staff in its requirement for allowing discovery. But the PUCO has shielded its staff from discovery. That should end.

In any event, the bill's detriments for consumers outweigh its benefits. The bill's major feature is its replacement of the electric security plans resulting from the failed ratemaking in Ohio's 2008 energy law. Eliminating electric security plans – or at least reforming the 2008 law's most anti-consumer provisions for the plans – should be an important consumer protection goal for millions of Ohio electric consumers. We appreciate that Senator Romanchuk has tried for years to achieve this public interest reform.

Attached is a draft bill for fixing the consumer problems in the 2008 law for electric security plans. It does not solve every problem for consumers, but the draft bill solves major known problems, including the refund issue. It comes without the risk of SB102 in

creating a new regulatory structure that utilities and the PUCO may interpret in ways not imagined.

In this key respect of reforming the law for electric security plans, the bill falls short. One problem is that the bill will not stop the current round of unfair ratemaking for consumers in electric security plans (except for Duke consumers). AES's proposed plan is nearing the end of its process. AEP's plan is far along. And FirstEnergy already has filed its proposed plan. These proposed electric security plans will be in effect for three to 10 years. So, even if the bill's approach to ratemaking were good for consumers, it will not have an effect on ending electric security plans until the 2030's for AEP and FE. That means the many riders under the plans will continue to be charged to consumers until the 2030's. Attached is OCC's Subsidy Scorecard, showing subsidies from such riders. Given the utilities' penchant for seeking favorable regulatory laws, we are skeptical that the bill, even if passed, would remain intact in the 2030's.

Another major problem is that the bill's approach to ratemaking is inadequate for consumer protection. For example, the bill does more harm than good regarding the major issue of enabling refunds of illegal utility charges to consumers. (Lines 96-104) The bill merely enables refunds for a very limited time period – only for utility charges to consumers after a Court reversal of the PUCO. Indeed, the PUCO has already used the bill's practice of requiring refunds after the Court's reversal.

Thus, the bill would not prevent a recurrence of such fiascos for consumers as FirstEnergy's so-called distribution modernization rider. FirstEnergy kept nearly half a billion dollars of so-called distribution modernization charges, without a refund to consumers. That was despite the Ohio Supreme Court ruling the PUCO-approved charge is illegal. Attached is an OCC chart showing refunds denied to consumers since 2009, despite PUCO-approved charges being invalidated.

So, in codifying the limitation on refunds, the bill is preventing the Supreme Court or a future PUCO from overturning current practice. Indeed, the PUCO ordered refund language in an AES tariff toward obtaining clarity from the Court on refunds (in a case that OCC intended to appeal). OCC did appeal and the refund issue is pending in the Court. Also, a problem for consumers is that the bill's refund provision does not apply to rate cases.

This codification of bad refund language in the bill is similar to the utilities obtaining codification of the OVEC-related coal power plant charges in House Bill 6, to subsidize AEP, Duke and AES. That codification meant a future PUCO or the Supreme Court could not overturn their decisions in the future.

Another problem is that, at the same time the bill is calling for greater use of traditional rate cases, the bill is harming consumers by impairing certain key elements of the rate case process. Traditional rate cases would become a lot less traditional under the bill, and mostly not in a good way for consumers.

For example, the bill allows utilities to use a projected test year, for determining their expenses and revenues. Perhaps worse, the bill allows a projection for whether utility property is “used and useful,” thus undermining one of the most important consumer protections in ratemaking. Consumers have not necessarily done well when ratemaking is based on utility projections. These ratemaking projections prevent the verifying that can be done by stakeholders when the utilities’ proposal is based at least on actual information. The bill does have a true up after thirteen months; however, there is no defined process and the true-up adds a level of complexity to rate cases that would approach the magnitude of a second rate case, if done fairly.

Furthermore, the bill is upending the rate case process. The bill would limit the use of written discovery. (Lines 1112-1120) That favors and protects lawyered-up utilities over consumers because the utilities have most of the information that needs to be discovered for case preparation. Instead, there ought to be a focus on protecting non-utility parties from utility delaying tactics and non-responsive answers on discovery.

Even worse, the bill limits the use of the most effective discovery tool, depositions. (Lines 1130-1134) The bill prohibits depositions unless the PUCO finds “extraordinary circumstances” and also limits the scope of depositions if allowed. Depositions are an ordinary (not extraordinary) case preparation tool that are part of our American system of justice. The PUCO already has a process allowing utilities and others to seek protection from unreasonable discovery. The 1983 reform law allows for “ample” discovery and that law should only be improved, not decimated. An improvement would be to give OCC its own subpoena power.

Additionally, the use of rate cases should be associated with an end to the add-on charges, aka the riders, that are a problematic feature of electric security plans. But under the bill, riders unfortunately are here to stay as add-on charges for consumers. An example is the bill’s Interim Distribution Mechanism. (Lines 709-808)

Other issues with new riders include the lack of traditional regulatory standards for their approval. As example of this problem is the economic development-related rider for natural gas utilities. (Lines 2823 -2830) This provision should also be removed because utilities have been given overly generous infrastructure riders, to the detriment of consumers, in the Senate’s recently passed budget bill (HB33).

Another ratemaking problem in the bill is a harm to the utility standard service offer. The most protective element of competition for utility energy consumers is the utility standard service offer. It is a market rate determined by competitive auctions, which benefits Ohioans who use it for their service. The standard offers also provide an important comparison for consumers considering energy marketer and aggregation offers.

But unfortunately, the bill caters to marketers regarding the standard offer. (Lines 1818-1822) The bill would override decisions by the PUCO that have protected standard-offer consumers from marketer claims. The PUCO rejected marketer claims about double

recovery of standard-offer costs, claims that would have, in essence, increased the standard offer price for consumers. This pro-marketer provision should be rejected.

Another marketer provision that is being codified includes the problem of teaser rates (known somewhat euphemistically as introductory rates). The bill requires marketers to give consumers notice if the teaser rate is being increased. (Lines 1665-1684; 2976 - 3024) Notice to consumers is fine. But this bill should give consumers much more protection against teaser rates and other energy marketer practices, such as door-to-door sales. Teaser rates and door-to-door sales should be banned. Teaser rates lead to confusion and higher charges to consumers.

Yet another ratemaking issue involves a transmission-related, reduced rate for big utility customers that seems to be addressed in the bill. (Lines 1837-1841) There is controversy over this rate that favors big business customers, given a concern that the benefit may be at the expense of a subsidy from smaller consumers. This provision in the bill seems designed to override a long-delayed PUCO inquiry, for consumer protection, into a pilot program from a FirstEnergy electric security plan. (PUCO Case 22-391) The program is known as the Non-Market Based Rider. The PUCO committed years ago to determining if smaller consumers are being made to subsidize the bigger customers. Most recently the PUCO attributed the delay in the audit to delays in responses from FirstEnergy. This provision should be removed from the bill, given the issue at the PUCO.

In sum, the consumer risks in SB102 greatly outweigh the consumer benefits. For consumer protection, please do not enact SB102 as currently drafted.

Thank you for your consideration.

\$15.29 Billion
Charged to Customers
(2000 - 2022)

SUBSIDY SCORECARD

- ELECTRICITY CHARGES TO OHIOANS -

\$509.5 Million Projected
Charges to Customers
(2023 - 2030)

FirstEnergy

\$10.28 Billion

AES Ohio

(formerly DP&L)

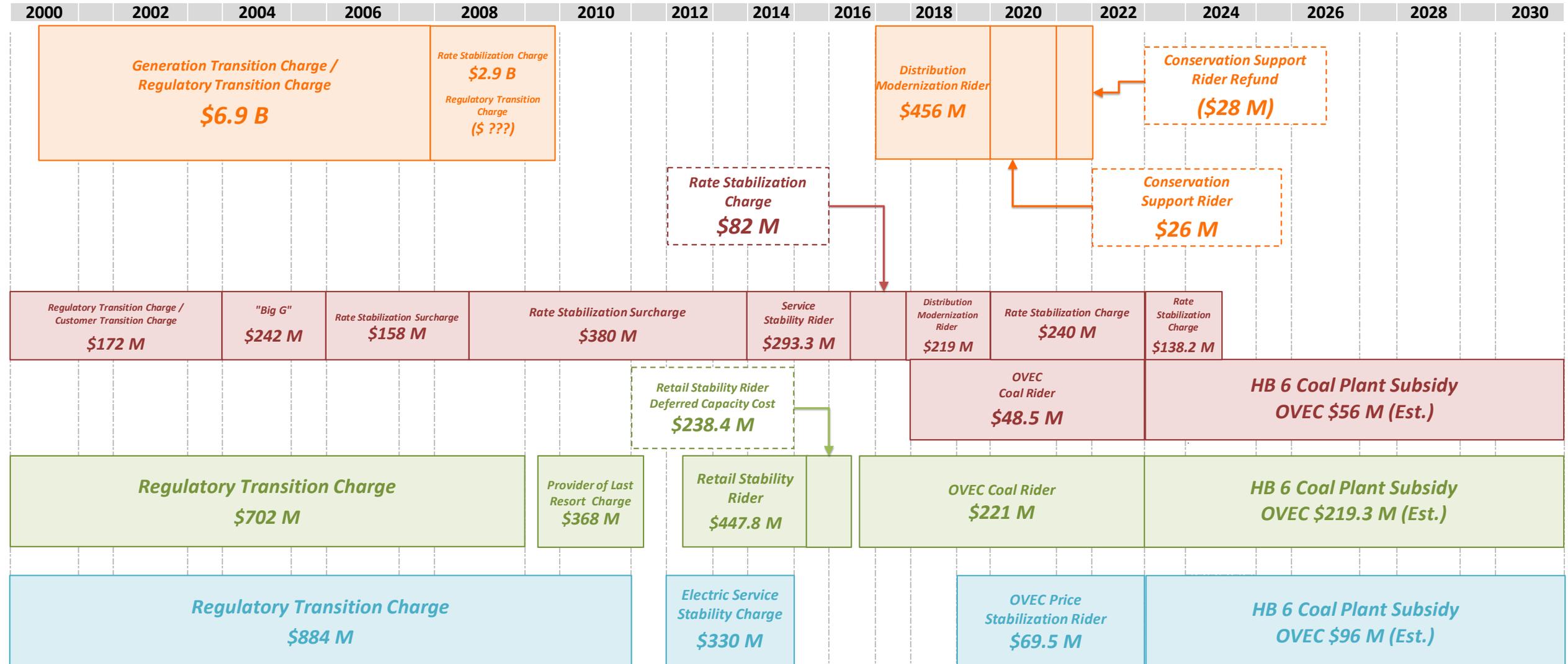
\$1.75 Billion

AEP

\$1.98 Billion

Duke

\$1.28 Billion



B=Billions; M=Millions

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I_135_0323-1

135th General Assembly
Regular Session
2023-2024

. B. No.

A BILL

To amend section 4928.143 and to enact sections 1
4903.101 and 4905.321 of the Revised Code to 2
revise utility law regarding customer refunds, 3
Public Utilities Commission rehearings, and 4
electric security plans. 5

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:

Section 1. That section 4928.143 be amended and sections 6
4903.101 and 4905.321 of the Revised Code be enacted to read as 7
follows: 8

Sec. 4903.101. (A) Except as provided in division (B) of 9
this section, the public utilities commission shall not grant a 10
rehearing pursuant to section 4903.10 of the Revised Code if 11
granting a rehearing delays issuance of a final appealable order 12
by more than sixty days after the filing date of the application 13
for rehearing. 14

(B) The sixty-day period described in division (A) of this 15
section does not apply if the commission grants a rehearing for 16
further consideration of additional evidence and establishes a 17



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hearing schedule for taking the evidence. The commission shall 18
hold the rehearing not later than seventy-five days after the 19
commission grants the rehearing. An order made by the commission 20
pursuant to the rehearing shall be issued not later than ninety 21
days after the rehearing commencement date. 22

Sec. 4905.321. Notwithstanding section 4905.32 of the 23
Revised Code, all charges paid by customers to a public utility 24
that are later found to be unreasonable, unlawful, imprudent, or 25
otherwise improper by the supreme court or other authority shall 26
be refunded to the customers who paid such charges not later 27
than six months following the authority's decision. The 28
commission shall order such refunds in a manner designed to 29
allocate the refunds to customer classes in the same proportion 30
as the charges were originally collected. The commission shall 31
order interest to be paid to consumers on the amount ordered to 32
be refunded, calculated at the public utility's long-term cost 33
of debt. Interest shall accrue beginning at the time the charge 34
is paid by consumers under a schedule filed with the commission. 35

Sec. 4928.143. (A) For the purpose of complying with 36
section 4928.141 of the Revised Code, an electric distribution 37
utility may file an application for public utilities commission 38
approval of an electric security plan as prescribed under 39
division (B) of this section. The utility may file that 40
application prior to the effective date of any rules the 41
commission may adopt for the purpose of this section, and, as 42
the commission determines necessary, the utility immediately 43
shall conform its filing to those rules upon their taking 44
effect. 45

(B) Notwithstanding any other provision of Title XLIX of 46
the Revised Code to the contrary except division (D) of this 47

section, divisions (I), (J), and (K) of section 4928.20, 48
division (E) of section 4928.64, and section 4928.69 of the 49
Revised Code: 50

(1) An electric security plan shall include provisions 51
relating to the supply and pricing of electric generation 52
service. In addition, if the proposed electric security plan has 53
a term longer than three years, it may include provisions in the 54
plan to permit the commission to test the plan pursuant to 55
division (E) of this section and any transitional conditions 56
that should be adopted by the commission if the commission 57
terminates the plan as authorized under that division. 58

(2) The plan may provide for or include, without 59
limitation, any of the following: 60

(a) Automatic recovery of any of the following costs of 61
the electric distribution utility, provided the cost is 62
prudently incurred: the cost of fuel used to generate the 63
electricity supplied under the offer; the cost of purchased 64
power supplied under the offer, including the cost of energy and 65
capacity, and including purchased power acquired from an 66
affiliate; the cost of emission allowances; and the cost of 67
federally mandated carbon or energy taxes; 68

(b) A reasonable allowance for construction work in 69
progress for any of the electric distribution utility's cost of 70
constructing an electric generating facility or for an 71
environmental expenditure for any electric generating facility 72
of the electric distribution utility, provided the cost is 73
incurred or the expenditure occurs on or after January 1, 2009. 74
Any such allowance shall be subject to the construction work in 75
progress allowance limitations of division (A) of section 76
4909.15 of the Revised Code, except that the commission may 77

authorize such an allowance upon the incurrence of the cost or 78
occurrence of the expenditure. No such allowance for generating 79
facility construction shall be authorized, however, unless the 80
commission first determines in the proceeding that there is need 81
for the facility based on resource planning projections 82
submitted by the electric distribution utility. Further, no such 83
allowance shall be authorized unless the facility's construction 84
was sourced through a competitive bid process, regarding which 85
process the commission may adopt rules. An allowance approved 86
under division (B) (2) (b) of this section shall be established as 87
a nonbypassable surcharge for the life of the facility. 88

(c) The establishment of a nonbypassable surcharge for the 89
life of an electric generating facility that is owned or 90
operated by the electric distribution utility, was sourced 91
through a competitive bid process subject to any such rules as 92
the commission adopts under division (B) (2) (b) of this section, 93
and is newly used and useful on or after January 1, 2009, which 94
surcharge shall cover all costs of the utility specified in the 95
application, excluding costs recovered through a surcharge under 96
division (B) (2) (b) of this section. However, no surcharge shall 97
be authorized unless the commission first determines in the 98
proceeding that there is need for the facility based on resource 99
planning projections submitted by the electric distribution 100
utility. Additionally, if a surcharge is authorized for a 101
facility pursuant to plan approval under division (C) of this 102
section and as a condition of the continuation of the surcharge, 103
the electric distribution utility shall dedicate to Ohio 104
consumers the capacity and energy and the rate associated with 105
the cost of that facility. Before the commission authorizes any 106
surcharge pursuant to this division, it may consider, as 107
applicable, the effects of any decommissioning, deratings, and 108

retirements.	109
(d) Terms, conditions, or charges relating to limitations	110
on customer shopping for retail electric generation service,	111
bypassability, standby, back-up, or supplemental power service,	112
default service, <u>and</u> carrying costs, amortization periods, and	113
accounting or deferrals, including future recovery of such	114
deferrals, as would have the effect of stabilizing or providing	115
certainty <u>for customers</u> regarding retail electric service;	116
(e) Automatic increases or decreases in any component of	117
the standard service offer price;	118
(f) Consistent with sections 4928.23 to 4928.2318 of the	119
Revised Code, both of the following:	120
(i) Provisions for the electric distribution utility to	121
securitize any phase-in, inclusive of carrying charges, of the	122
utility's standard service offer price, which phase-in is	123
authorized in accordance with section 4928.144 of the Revised	124
Code;	125
(ii) Provisions for the recovery of the utility's cost of	126
securitization.	127
(g) Provisions relating to transmission, ancillary,	128
congestion, or any related service required for the standard	129
service offer, including provisions for the recovery of any cost	130
of such service that the electric distribution utility incurs on	131
or after that date pursuant to the standard service offer;	132
(h) Provisions regarding the utility's distribution	133
service, including, without limitation and notwithstanding any	134
provision of Title XLIX of the Revised Code to the contrary,	135
provisions regarding single issue ratemaking, a revenue	136
decoupling mechanism or any other incentive ratemaking, and	137

provisions regarding distribution infrastructure and 138
modernization incentives for the electric distribution utility. 139
The latter may include a long-term energy delivery 140
infrastructure modernization plan for that utility or any plan 141
providing for the utility's recovery of costs, ~~including lost~~ 142
~~revenue, shared savings, and avoided costs,~~ and a just and 143
reasonable rate of return on such infrastructure modernization. 144
As part of its determination as to whether to allow in an 145
electric distribution utility's electric security plan inclusion 146
of any provision described in division (B) (2) (h) of this 147
section, the commission shall examine the reliability of the 148
electric distribution utility's distribution system and ensure 149
that customers' and the electric distribution utility's 150
expectations are aligned and that the electric distribution 151
utility is placing sufficient emphasis on and dedicating 152
sufficient resources to the reliability of its distribution 153
system. 154

(i) Provisions under which the electric distribution 155
utility may implement economic development, job retention, and 156
energy efficiency programs, which provisions may allocate 157
program costs across all classes of customers of the utility and 158
those of electric distribution utilities in the same holding 159
company system. 160

(C) (1) The burden of proof in the proceeding shall be on 161
the electric distribution utility. The commission shall issue an 162
order under this division for an initial application under this 163
section not later than one hundred fifty days after the 164
application's filing date and, for any subsequent application by 165
the utility under this section, not later than two hundred 166
seventy-five days after the application's filing date. Subject 167
to division (D) of this section, the commission by order shall 168

approve or modify and approve an application filed under 169
division (A) of this section if it finds that the electric 170
security plan so approved, including its pricing and all other 171
terms and conditions, including any deferrals and any future 172
recovery of deferrals, is more favorable in the aggregate to 173
consumers as compared to the expected results that would 174
otherwise apply under section 4928.142 of the Revised Code so 175
that the electric security plan, in total, costs less for 176
consumers than a standard service offer would cost under section 177
4928.142 of the Revised Code. Additionally, if the commission so 178
approves an application that contains a surcharge under division 179
(B) (2) (b) or (c) of this section, the commission shall ensure 180
that the benefits derived for any purpose for which the 181
surcharge is established are reserved and made available to 182
those that bear the surcharge. Otherwise, the commission by 183
order shall disapprove the application. 184

~~(2) (a) If the commission modifies and approves an 185
application under division (C) (1) of this section, the electric 186
distribution utility may withdraw the application, thereby 187
terminating it, and may file a new standard service offer under 188
this section or a standard service offer under section 4928.142 189
of the Revised Code.~~ 190

~~(b) (2) If the utility terminates an application pursuant 191
to division (C) (2) (a) of this section or if the commission 192
disapproves an application under division (C) (1) of this 193
section, the commission shall issue such order as is necessary 194
to continue the provisions, terms, and conditions of the 195
utility's most recent standard service offer, along with any 196
expected increases or decreases in fuel costs from those 197
contained in that offer, until a subsequent offer is authorized 198
pursuant to this section or section 4928.142 of the Revised 199~~

Code, respectively. 200

(D) Regarding the rate plan requirement of division (A) of 201
section 4928.141 of the Revised Code, if an electric 202
distribution utility that has a rate plan that extends beyond 203
December 31, 2008, files an application under this section for 204
the purpose of its compliance with division (A) of section 205
4928.141 of the Revised Code, that rate plan and its terms and 206
conditions are hereby incorporated into its proposed electric 207
security plan and shall continue in effect until the date 208
scheduled under the rate plan for its expiration, and that 209
portion of the electric security plan shall not be subject to 210
commission approval or disapproval under division (C) of this 211
section, and the earnings test provided for in division (F) of 212
this section shall not apply until after the expiration of the 213
rate plan. However, that utility may include in its electric 214
security plan under this section, and the commission may 215
approve, modify and approve, or disapprove subject to division 216
(C) of this section, provisions for the incremental recovery or 217
the deferral of any costs that are not being recovered under the 218
rate plan and that the utility incurs during that continuation 219
period to comply with section 4928.141, division (B) of section 220
4928.64, or division (A) of section 4928.66 of the Revised Code. 221

(E) If an electric security plan approved under division 222
(C) of this section, ~~except one withdrawn by the utility as~~ 223
~~authorized under that division,~~ has a term, exclusive of phase- 224
ins or deferrals, that exceeds three years from the effective 225
date of the plan, the commission shall test the plan in the 226
fourth year, and if applicable, every fourth year thereafter, to 227
determine whether the plan, including its then-existing pricing 228
and all other terms and conditions, including any deferrals and 229
any future recovery of deferrals, continues to be more favorable 230

in the aggregate and during the remaining term of the plan as 231
compared to the expected results that would otherwise apply 232
under section 4928.142 of the Revised Code. The commission shall 233
also determine the prospective effect of the electric security 234
plan to determine if that effect is substantially likely to 235
provide the electric distribution utility with a return on 236
common equity that is ~~significantly~~ in excess of the return on 237
common equity that is likely to be earned by publicly traded 238
companies, including utilities, that face comparable business 239
and financial risk, ~~with such adjustments for capital structure~~ 240
~~as may be appropriate~~. The burden of proof for demonstrating 241
that ~~significantly~~ excessive earnings will not occur shall be on 242
the electric distribution utility. If the test results are in 243
the negative or the commission finds that continuation of the 244
electric security plan will result in a return on equity that is 245
~~significantly~~ in excess of the return on common equity that is 246
likely to be earned by publicly traded companies, including 247
utilities, that will face comparable business and financial 248
risk, ~~with such adjustments for capital structure as may be~~ 249
~~appropriate~~, during the balance of the plan, the commission may 250
terminate the electric security plan, but not until it shall 251
have provided interested parties with notice and an opportunity 252
to be heard. The commission may impose such conditions on the 253
plan's termination as it considers reasonable and necessary to 254
accommodate the transition from an approved plan to the more 255
advantageous alternative. In the event of an electric security 256
plan's termination pursuant to this division, the commission 257
shall permit the continued deferral and phase-in of any amounts 258
that occurred prior to that termination and the recovery of 259
those amounts as contemplated under that electric security plan. 260

(F) With regard to the provisions that are included in an 261

electric security plan under this section, the commission shall 262
consider, following the end of each annual period of the plan, 263
if any such adjustments resulted in excessive earnings as 264
measured by whether the earned return on common equity of the 265
electric distribution utility is ~~significantly~~ in excess of the 266
return on common equity that was earned during the same period 267
by publicly traded companies, including utilities, that face 268
comparable business and financial risk, ~~with such adjustments~~ 269
~~for capital structure as may be appropriate. Consideration also~~ 270
~~shall be given to the capital requirements of future committed~~ 271
~~investments in this state.~~ The burden of proof for demonstrating 272
that ~~significantly~~ excessive earnings did not occur shall be on 273
the electric distribution utility. If the commission finds that 274
such adjustments, in the aggregate, did result in ~~significantly~~ 275
excessive earnings, it shall require the electric distribution 276
utility to return to consumers the amount of the excess by 277
prospective adjustments, ~~provided that, upon making such~~ 278
~~prospective adjustments, the electric distribution utility shall~~ 279
~~have the right to terminate the plan and immediately file an~~ 280
~~application pursuant to section 4928.142 of the Revised Code.~~ 281
~~Upon termination of a plan under this division, rates shall be~~ 282
~~set on the same basis as specified in division (C) (2) (b) of this~~ 283
~~section, and the commission shall permit the continued deferral~~ 284
~~and phase in of any amounts that occurred prior to that~~ 285
~~termination and the recovery of those amounts as contemplated~~ 286
~~under that electric security plan.~~ In making its determination 287
of ~~significantly~~ excessive earnings under this division, the 288
commission shall not consider, directly or indirectly, the 289
revenue, expenses, ~~or~~ earnings, or contributions of any 290
affiliate or parent company. 291

Section 2. That existing section 4928.143 of the Revised 292

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I_135_0323-1

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Code is hereby repealed.

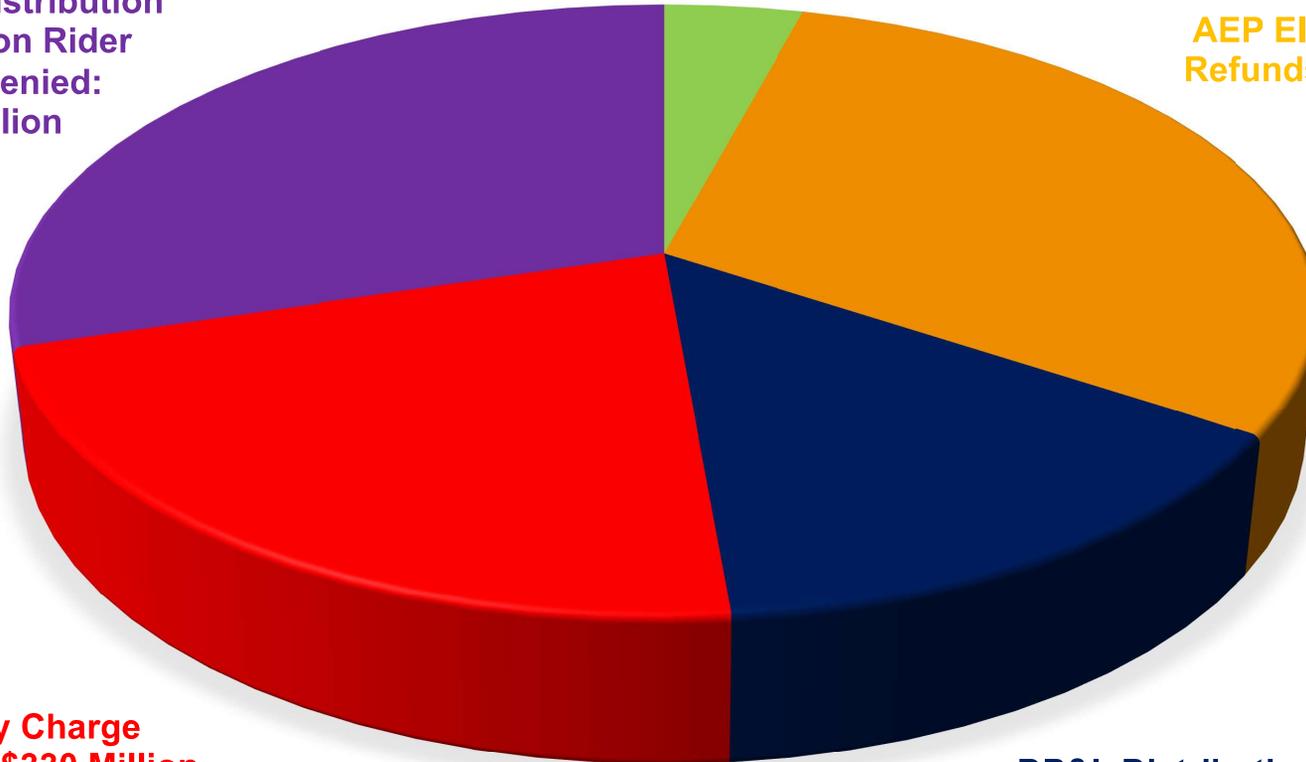
293

OHIOANS DENIED \$1.5 BILLION IN ELECTRIC REFUNDS SINCE 2009

AEP Electric Security Plan I
Refunds Denied: \$63 Million

FirstEnergy Distribution
Modernization Rider
Refunds Denied:
\$456 Million

AEP Electric Security Plan II
Refunds Denied: \$463 Million



DP&L Stability Charge
Refunds Denied: \$330 Million

DP&L Distribution Modernization Rider
Refunds Denied: \$218 Million